

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DITTO, INCORPORATED

APPELLANT,

**v.
HEATHER DAVIDS, CHRIS DAVIDS
AND REVIVE LEE'S SUMMIT, LLC,
F/K/A DITTO LEE'S SUMMIT, LLC**

RESPONDENTS.

DOCKET NUMBER WD77297

DATE: November 12, 2014

Appeal From:

Jackson County Circuit Court
The Honorable James F. Kanatzar, Judge

Appellate Judges:

Division Three: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Attorneys:

Stephen B. Millin Jr., Kansas City, MO, for appellant.

Scott R. Ast and Michele F. Sutton, Kansas City, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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No. WD77297

Jackson County

Before Division Three: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Ditto, Inc. filed suit against Heather Davids, Chris Davids, and Revive Lee's Summit, LLC f/k/a/ Ditto Lee's Summit. The suit alleged that the Defendants breached a contract denominated a "joint venture agreement." The trial court entered summary judgment in favor of the Defendants, which Ditto appeals. Ditto asserts that the grant of summary judgment was erroneous because: (1) the joint venture agreement between Ditto and the Defendants had a definite term and was not terminable at will as a matter of law; (2) summary judgment should not have been granted based on the affirmative defense of equitable estoppel when the Defendants did not properly plead that defense; and (3) alternatively, material facts remained in genuine dispute regarding the affirmative defense of equitable estoppel preventing the entry of judgment as a matter of law.

REVERSED AND REMANDED.

Division Three holds:

(1) While the joint venture agreement between Ditto and the Defendants did not expressly fix a termination date, the joint venture agreement had a termination date by necessary implication. The joint venture agreement unambiguously addressed the cooperative agreement of Ditto and Heather Davids to operate a retail store in leased premises. The lease, which was referenced in the joint venture agreement, was signed contemporaneously with the joint venture agreement. When several instruments relating to the same subject are executed at the same time, the instruments will be construed together unless the realities of the situation require otherwise. The realities of the situation do not require that we construe the joint venture agreement and lease separately. Thus, we conclude that the joint venture agreement, which is defined as ending upon completion of the obligations therein set forth, has a term that is necessarily co-extensive with the term of the lease. The joint venture agreement is not terminable at will.

(2) Equitable estoppel is an affirmative defense that must be must be set forth in a responsive pleading, along with a short and plain statement showing that the pleader is entitled to the defense. Here, the Defendants' answer simply included a conclusory statement that alleged they were entitled to equitable estoppel. A conclusory statement does not meet the pleading requirements for an affirmative defense and cannot be relied upon as a basis for summary judgment.

(3) Because the Defendants did not plead equitable estoppel properly so that the trial court's entry of summary judgment on the basis of the defense was error as a matter of law, resolution of this point on appeal is unnecessary. Nonetheless, an attorney's conclusion of law, such as whether a contract is terminable at will, is an opinion and does not constitute a misrepresentation of a material fact as required to establish equitable estoppel as an affirmative defense.

Opinion by Cynthia L. Martin, Judge

November 12, 2014

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